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ALEXANDER L. STEVAS,
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

STEPHEN L. RUTH,

Defendant- Appellant

v.

UNITED STATES OF AMERICA,

Plaintiff-Appellee

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the decision below conflicts with this Court's holding in Washington v. Strickland, ____ U.S. ____, 80 L.Ed.2d 674, 104 S.Ct. ____ (1984), that the ultimate inquiry must be on fundamental fairness when deciding an ineffective assistance of counsel claim ?

2. Whether the decision below is contrary to the rules established by this Court in Tollett v. Henderson, 411 U.S. 258, 36 L.Ed.2d 235, 93 S.Ct. 1602 (1973), that ineffective assistance of counsel which causes an uninformed and involuntary plea results in the defendant being allowed to replead?

3. Whether the decision below is contrary to the Fourth Circuit Opinion in

Strader v. Garrison, 611 F.2d 61 (4th Cir. 1979), where the Court held a prisoner was denied effective assistance of counsel when he pled guilty on the misadvice of counsel that the sentence imposed would not postpone his parole eligibility date?

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Federal Parole Practices = Better Management and Legislative Changes are Needed

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Appeals for the Fifth Circuit entered in this action on September 10, 1984.

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit rendered an unreported opinion in this matter on September 10, 1984. Petitioner's Motion for Rehearing was denied by the Court of Appeals in an unreported opinion on October 23, 1984. At the district court level, a decision was entered on the merits by the United States District Court for the Western District of Texas on February 3, 1984 and was unreported.

All of the above opinions, orders and jugments, are included in the Appendix to this petition.

JURISDICTION

The judgment of the United States Court of Appeals in this matter was

entered on September 10, 1984 and the Motion for Rehearing was denied on October 23, 1984. This petition for a Writ of Certiorari is filed within sixty days of the entry of that judgment and Supreme Court jurisdiction is invoked under 28 U.S.C. § 1254(1)

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. VI.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining

witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

Petitioner was indicted with twelve other defendants with conspiracy to import marijuana into Texas. He pled not guilty and his trial commenced on March 2, 1981, to be recessed until March 16, 1981. During the interim Petitioner entered into a plea agreement with the Federal Prosecutor whereby he would plead guilty to a two-count information. In consideration for Mr. Ruth's plea the government agreed to drop all charges in the original indictment. Mr. Ruth pled guilty on March 16, 1981, and was sentenced to five years in prison on the first count and supervised probation for five years following his release on the second count.

The Petitioner was represented by Michael Kennedy, Esq. at the plea and sentencing proceedings. Kennedy and Petitioner met for two to three hours discussing the plea agreement prior to Mr. Ruth pleading guilty to the two Count information. During that discussion, Petitioner repeatedly sought advice regarding the actual incarceration period associated with the guilty plea. Mr. Kennedy assured Petitioner that the dismissed counts would not be considered by the Parole Commission. Mr. Kennedy also informed Mr. Ruth that the parole guidelines would be six to eighteen months and that he could expect to be released in twelve months. At the time Mr. Kennedy rendered his advice regarding the published parole guidelines, he knew that Petitioner was relying on the advice as

the inducement to enter a guilty plea. Petitioner pled guilty on the advice of counsel that the dismissed conspiracy counts would not be considered by the Parole Commission in determining parole.

Prior to the sentencing hearing on May 26, 1981, Mr. Kennedy was given the opportunity to review the Presentence Investigation Report. Counsel knew that the report would be considered by the trial judge in determining the sentence and by the United States Parole Commission in determining the parole eligibility date. The report concluded that the recommended parole guidelines would permit release of Petitioner after thirty-six to forty-eight months of incarceration. These guidelines were based on consideration of all overt acts alleged in Count I of the original indictment.

Mr. Kennedy reviewed the guidelines but erred in believing that they would only apply if his client received the maximum nine year sentence. Petitioner's attorney was clearly incorrect in his assessment of the parole guidelines and their application to his client. Any reasonably competent criminal attorney knows that parole eligibility determinations are not made on the basis of the sentence handed down by the trial judge.

The crucial advice of counsel which induced Petitioner to plead guilty was later found to be completely erroneous. The United States Parole Commission assessed a presumptive parole date after forty-two months of incarceration on the basis of dismissed conspiracy counts in the indictment. No evidence was presented to substantiate the dismissed counts,

yet the Commission utilized them to substantially extend Petitioner's incarceration period. The Petitioner pled guilty, as many criminal defendants, on the basis of his "actual" incarceration period and not the sentence handed down by the trial court. Furthermore, if Petitioner had been accurately informed of his actual incarceration period (thirty-six to forty-eight months), he would not have pled guilty to the two-count information.

Congress has recently concluded a study of the United States Parole Commission which resulted in the enactment of the Comprehensive Crime Bill of 1984. This law was passed in response to abuses by the Commission in determining parole. These inequities are discussed in a report from the Comptroller General

entitled Federal Parole Practices: Better Management and Legislative Changes Are Needed. That report at page 122 stated as follows:

> Although a judge should not be required to explain the entire parole system to each defendant entering a plea agreement, we believe that he or she should advise the defendant of the Commission's practice of considering not only the offense of conviction, but also other charges dismissed through a plea agreement. Several judges and Parole Commissioners told us that they favored an amendment to Rule 11(c) of the Federal Rules of Criminal Procedure to ensure that defendants were aware of the Commission's practice.

The new law calls for the development of a Sentencing Commission and the abolishment of the United States Parole Commission as it currently exists.

The Petitioner retained new counsel and filed a Section 2255 Motion in the United States District Court for the

Western District of Texas in late 1983. The motion was based on the assertion that the Petitioner's guilty plea was involuntary and unknowing due to (1) ineffective assistance of counsel; and (2) the failure of the trial court to establish a factual basis under Rule 11(f), F.R. Crim. P. No evidentiary hearing was held in light of the hearing conducted on February 25, 1983 for Petitioner's pro se Section 2255 Motion. A letter was added to the record from Michael Kennedy, Petitioner's original counsel, addressed to the Trial Court dated December 15, 1982. Upon consideration, the motion under 28 U.S.C. § 2255 was denied by Order dated February 3, 1984.

The District Court's denial was based on its conclusion that statements

from counsel were a prediction more than a guarantee. On the ground that Petitioner risked imprisonment of approximately forty years prior to the plea agreement, the Court found counsel's mistaken advice had not induced the guilty plea. In its Opinion, the Court recognized that Mr. Kennedy's advice was clearly erroneous and therefore relied on the lack of inducement for its decision. Throughout the proceeding, it was unrefuted that Petitioner would not have pled guilty but for the advice of counsel regarding eligibility for parole.

The case was appealed to the Court of Appeals for the Fifth Circuit, the Court having jurisdiction under 28 U.S.C. §§ 1291 and 2106, because the District Courts ruling was a final judgment. The Fifth Circuit denied the Petitioner's

appeal of the ineffective assistance of counsel contention solely on the basis of this Court's decision in Strickland v. Washington, --U.S.--, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). Because the Petitioner faced an exposure of forty-five years in prison under the original indictment, the Court reasoned that Petitioner could not satisfy the prejudice test announced in Strickland. The prejudice test as stated by this Court requires "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." In so holding, the Court of Appeals did not address the issue of whether or not the Petitioner's counsel's actions violated the performance test of Strickland.

REASONS FOR GRANTING THE WRIT

1. **The decision below is in conflict with this Court's holding in Strickland v. Washington, that when determining an ineffective assistance of counsel claim, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.**

The Court of Appeals relied upon the Strickland case in its decision but failed to apply this Court's teachings to the Petitioner's case. Both lower courts failed to focus upon the plea and sentencing proceedings. Both these hearings could be considered nothing but unfair since the Petitioner was induced to plead guilty on false assurances of counsel that he would be granted parole in six to eighteen months.

The Court of Appeals illustrated the error in its analysis by stressing the fact that the plea agreement limited the Petitioner's potential exposure and that Mr. Ruth was intelligent and aware. The issue presented to that court was not the advisability of the plea agreement or the intelligence of the Petitioner. The Court avoided the entire ineffective assistance of counsel contention. It never considered the fact that Petitioner did not enter a knowing and intelligent plea. Petitioner has repeatedly stated that he would not have pled guilty to the two Count information, if he had known it would require incarceration for forty-two months. There is no question that the prejudice test announced in Strickland was satisfied in this case. The mistake by Petitioner's counsel induced Ruth to

plead guilty which denied him the opportunity to defend against the Government's claims.

The Court of Appeals did not articulate if it believed Petitioner's counsel, by misstating the parole guidelines applicable to Mr. Ruth's plea, satisfied the defective performance test stated in Strickland. This probably results from the statement of this Court that when deciding an ineffective assistance claim a court need not address both tests, if it finds the defendant has made an insufficient showing on one. Therefore, implicit in the Court of Appeals decision is the finding that counsel's actions fell below the professionally reasonable standard. This being the case, this matter should be reversed and remanded

with orders that the lower court correctly apply the prejudice test announced in Strickland.

If this Court should find that the Court of Appeals decision did not implicitly state that Petitioner's counsel had failed the performance test, the case should be remanded for the lower court to resolve that issue. In Strickland, this Court stated that "the defendant must show that counsel's representation fell below an objective standard of reasonableness" to prevail on an ineffectiveness of counsel claim. Petitioner was very interested in being advised of the incarceration period resulting from a guilty plea and discussed at length the standards with his counsel. Counsel understated the incarceration period by approximately two and one half years.

The Petitioner's counsel was provided with the presentence investigation report which set out the parole guidelines of 36 to 48 months, just prior to the sentencing proceeding. At this point, the guilty plea could have been withdrawn and counsel's prior misstatement remedied. Instead, counsel misinterpreted the guidelines as not relevant to his client's parole determination, with the result being that counsel's prior error was only magnified. The Court of Appeals erroneously applied the tests announced by this Court in Strickland and has thereby ruled contrary both to the intent of this Court and the language of that opinion. The crucial inquiry in these cases is fundamental fairness.

The injustice that has been caused Petitioner is due to the ineffective

assistance of his counsel and to the procedures of the United States Parole Commission. Congress has recognized the inequities in parole determinations and is reviewing the Commission's current practices. The Parole Commission's practice of considering dismissed counts in the determination of the parole eligibility date has been approved by several Circuit Courts. This occurs even when the prisoner is not afforded any constitutional protections. See, Billiteri v. United States Board of Parole, 541 F.2d 938 (2nd Cir. 1976); U.S. ex rel Goldberg v. Warden, 622 F.2d 60 (3rd Cir. 1980); and Bistram v. United States Parole Board, 535 F.2d 329 (5th Cir. 1976). As illustrated by the facts presented in the case at bar, a defendant receiving accurate advice regarding

parole eligibility is essential to the rendering of a knowing and voluntary plea. It is fundamentally unfair for an error by counsel regarding eligibility for parole, which induces a guilty plea, to remain unremedied. Many defendants are pleading guilty pursuant to plea agreements and only finding out after reporting to prison that the incarceration period will be extended due to the nature of the dismissed counts.

2. The decision below conflicts with this Court's holding in Tollett v. Henderson, 411 U.S. 258, 36 L.Ed2d 235, 93 S.Ct. 1602 (1973), that the inquiry into an ineffective assistance of counsel contention is on the nature of the advice and the voluntariness of the plea.

In Tollett, this Court held that when a criminal defendant seeks to

challenge the entry of a guilty plea, he may only attack the voluntary and intelligent character of the guilty plea. This court required a showing that the advice defendant received from counsel was not within the range of competence demanded of attorneys in criminal cases. The lower courts overlooked this line of cases which actually governs this matter. The Court of Appeals ignored the Petitioner's argument that the obvious misstatement of counsel, which induced the guilty plea in these circumstances made the plea unknowing. Petitioner would not have pled guilty to the two count information if he knew he would be incarcerated for thirty six to forty eight months instead of the six to eighteen months stated by counsel.

The Court of Appeals erred in dismissing the Petitioner's ineffective assistance of counsel contention solely on the basis of the prejudice test announced in Strickland. This Court in Strickland addressed a challenge to defense counsel's advice during the sentencing proceeding. This Court in Tollett distinguished the determination of ineffective assistance claims when the claim arose prior to the guilty plea and those when the claim arose after the guilty plea. Based on that well founded analysis, the two types of ineffective assistance of counsel claims are decided by different inquiries. The Strickland prejudice test is not applicable to the case at bar. The Court of Appeals was bound by this Court's decisions to analyze the conduct of Petitioner's

counsel in light of the voluntariness and knowingness of the plea, not the prejudice suffered due to the error of counsel.

The conclusion that the analysis announced by this Court in Tollett is correct as opposed to the two part test in Strickland is a more reasonable interpretation. When counsel makes an error after the guilty plea has been entered, the plea should not be vacated. In that case the defendant has knowingly and voluntarily entered his plea, and errors in sentencing may have occurred. This is the basic rationale for the prejudice test announced in Strickland. When counsel makes an error at the pleading stage, the facts of the case have not developed to the point where a court

could decide if the outcome of the proceeding would have reasonably been different absent the error. The focus is placed on the requirement that the plea be made knowingly and voluntarily. To apply the Strickland tests literally to the facts presented in all ineffective assistance of counsel cases would violate the policies stated in Tollett. The result would be to make it nearly impossible that a defendant could ever have a plea removed upon establishing that counsel error induced the plea.

Petitioner's case gives this Court the opportunity to recognize the conflicting rules announced in Strickland and Tollett. It is clear that the Strickland analysis is inappropriate in cases such as the case sub judice, because the prejudice test is immeasurable

by the lower courts. Therefore, this Court should either clarify the relationship of these two cases as precedent or issue a new rule applicable to ineffective assistance claims which involve an inducement to plead guilty.

3. The decision below is contrary to the Fourth Circuit Opinion in Strader v. Garrison, 611 F.2d 61 (4th Cir. 1979), where the Court held a prisoner was denied effective assistance of counsel when he pled guilty on the misadvice of counsel that the sentence imposed would not postpone his parole eligibility date.

The Fifth Circuit stated in its decision, that it would not follow the Fourth Circuit case because the holding was not law in the Fifth Circuit. An attempt was made to distinguish the facts

of Strader from those presented in Petitioner's matter, but it is readily apparent that the cases are closely related factually. Therefore, this Court is faced with a split of authority in the Federal Circuit Courts on the identical issue. The Petitioner respectfully requests that this Court invoke its power of supervision over the circuit courts and resolve this dispute.

Furthermore, the Fourth Circuit's Opinion in Strader was implicitly approved by the First Circuit in Cepulonis v. Ponte, 699 F.2d 573 (1st Cir. 1983). In Cepulonis the Court denied the prisoner's motion to vacate a guilty plea because no showing was made that the correct information on parole eligibility would have altered the prisoner's decision to plead guilty.

The Court of Appeals decision in this case and the Strader line of cases establish different guidelines to evaluate an ineffective assistance of counsel claim. With the seriousness of the deprivation of constitutional rights involved in these cases, this issue should be decided by the United States Supreme Court.

CONCLUSION

For all the reasons stated, the petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit should be granted and the decision below reversed by this Honorable Court.

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1132

SUMMARY CALENDAR

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STEPHEN L. RUTH,

Defendant-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

(September 10, 1984)

Before REAVLEY, POLITZ and HIGGINBOTHAM, Circuit Judges.

POLITZ, Circuit Judge:

Stephen L. Ruth appeals the rejection of his second 28 U.S.C. §2255 motion for relief from the sentence he received following a guilty plea. Ruth contends that his conviction is constitutionally faulty because he received ineffective assistance of counsel and his guilty plea was not based on an adequate factual basis.

Facts and Procedural Background

We are obliged to summarize the factual history and outline procedural developments in order to set the stage for consideration of the pending motion. Ruth and a dozen others were named in a 35-count indictment growing out of the uncovering of an extensive marihuana smuggling operation. Ruth was charged in nine counts which carried a sentence exposure totaling 45 years imprisonment

plus a special parole term of up to life. In the course of trial preparation, Ruth's counsel, Michael Kennedy, upon learning the strength of the government's case, became convinced that Ruth would be convicted on most if not on all nine counts. Kennedy so advised Ruth, further advising that an attempt to negotiate a guilty plea should be made. Ruth agreed and after negotiations, the government superseded the indictment with an information charging one count of conspiracy to import, 21 U.S.C. §§952(a), 963 (the same as the first count in the indictment), and one count of using a telephone to facilitate commission of a felony, 21 U.S.C. §843(b). Ruth's maximum sentence exposure under these charges was nine years with no mandatory special parole term requirement.

Ruth pled guilty under a plea agreement which obliged the government to dismiss all charges contained in the indictment other than the one included in the information. After the plea was accepted, Ruth was sentenced to five years on the conspiracy count, with sentence imposed under 18 U.S.C. §4205(b)(2), making him immediately eligible for parole. On the telephone charge he received a sentence of four years which was ordered to run consecutively and then suspended, plus five years probation. There was no direct appeal.

Fourteen months later, represented by new counsel, Ruth filed his first §2255 motion, alleging that his guilty plea was not voluntary but was induced by the assurance of his trial counsel that

he would receive a six to twelve month sentence. This motion was amended to allege that Kennedy made a promise that Ruth would not be incarcerated for over a year and would, in all probability, be free in 90 days. The amended motion further alleged an understanding between Ruth and the U.S. Attorney that Ruth would not receive more than one year. This motion was later supplemented to allege an undisclosed plea agreement between Kennedy and the prosecutor that the dismissed counts would not be used against Ruth at sentencing or by the Parole Commission and that one year was the ceiling on time to be served. Ruth also alleged at that time that no adequate factual predicate for the guilty plea had been established before the plea was accepted.

After an evidentiary hearing, the district court rejected Ruth's amended and supplemented motion. No appeal was taken. Instead, Ruth filed a motion for reduction of sentence. That motion was denied and no appeal was noted. Ruth then filed the present §2255 motion purportedly asserting "different valid grounds." The grounds alleged are: (1) Kennedy furnished ineffective assistance of counsel by advising Ruth that the dismissed counts would not be used against him and that he would be paroled within one year, and (2) the factual basis for the guilty plea was inadequate. Ruth suggested that the court did not consider these grounds in ruling on the first motion.

The district court rejected the current motion, finding that when Kennedy

spoke of the possible sentence he was making a prediction rather than guaranteeing a parole eligibility time frame. The court also found that there was an adequate factual basis for the plea and, by implication found that Ruth's guilty plea did not turn on Kennedy's statements about anticipated sentencing and parole. We agree with the district court's findings and conclusions and affirm.

Discussion

In this instance we will defer to the district court's decision to entertain this second §2255 motion. Usually successive, repetitive applications will not be countenanced. Sanders v. United States, 373 U.S. 1 (1963); Tallent v. United States, 604 F.2d 370 (5th Cir. 1979).

The evidence developed at the evidentiary hearing, taken together with the entire record, belies Ruth's contentions. Kennedy testified of the developments which led to the plea negotiations and to his recommendation that Ruth plead to the two counts with a nine-year total exposure rather than proceed to trial on the nine counts. He erroneously, but in good faith, advised Ruth that the dismissed counts would not be considered by the court in sentencing or by the Parole Commission. See 18 U.S.C. §4027(3); 28 C.F.R. 2.19. Kennedy further testified to informing Ruth that there was no agreement or guarantee of sentencing under 18 U.S.C. §4205(b)(2), which provides for immediate parole eligibility, but if Ruth was so sentenced he could expect the parole guidelines to be six to

eighteen months with an anticipated release in a year. Based on his years of criminal trial experience, Kennedy expected Ruth to serve about 20 months on a straight sentence. Kennedy testified that this advice was factored into Ruth's plea decision. Kennedy was specific: there was no undisclosed plea bargain, there was no promise or assurance that Ruth would serve no more than 12 months, and he and Ruth had an opportunity to read the presentence report. That report prognosed service of 36 to 48 months before parole, but noted the Parole Commission's right to go above or below the guidelines. Kennedy testified that he did not think the 36 to 48 month threshold would apply if Ruth received only five of the nine years.

Ruth testified of his belief that only the telephone call he made to a co-conspirator would be used against him and that the myriad overt acts listed in the indictment would not be brought up. Ruth denies ever admitting that he was the pilot of planeloads of smuggled marijuana, or that he was involved in the larger conspiracy.

The assistant U.S. Attorney assigned to the prosecution testified that the only plea agreement reached was the one presented to the court, that he never said or implied that Ruth would be released within a year, and that "the Parole Commission and their guidelines were absolutely not involved" in the plea discussions.

The probation officer who prepared the presentence report testified that he

gave the entire presentence report to Ruth, including the section which anticipated a 36 to 48 month period of service before parole consideration. Ruth denied seeing that section, insisting that he would not have pled guilty if he had. The court did not credit this assertion. At the time of sentencing, however, Ruth answered yes to the court's inquiry whether he "had the opportunity to go over the rather lengthy presentence report." The district court found that Kennedy had made a prediction rather than a promise or guarantee of parole eligibility, that Ruth had failed to establish that Kennedy's erroneous advice had induced a guilty plea which he would not otherwise have entered, and that there was a sufficient factual basis for the plea. The court further found that Ruth

had received the effective assistance of counsel. We accept these factual findings; none has been shown to be clearly erroneous. Fed.R.Civ.P. 52(a).

1. Effective Assistance of Counsel.

The standard of determining the sixth amendment standard of effective assistance was recently pronounced by the Supreme Court in Strickland v. Washington, 104 S.Ct. 2052 (1984). Gauging Kennedy's performance against that standard, it is immediately apparent that Ruth's challenge is without merit. As the Supreme Court observed, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding," Id. at 2066, and the defendant must show the "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different." Id. at 2068. In making this evaluation we do not operate with the 20/20 visual acuity of hindsight but must consider the matter in the setting in which the various decisions were made.

In that setting we find Ruth charged in nine counts of a 35-count indictment with an exposure of 45 years plus a lifetime of special parole terms. We find his experienced trial counsel, after learning that several informants were prepared to testify against Ruth, concerned that his client would be found guilty and recommending plea discussions. We find Ruth agreeing and we find Ruth accepting the proposal that he plead guilty to two counts in a superseding information, a repeat of the conspiracy count of the indictment, less the litany of overt acts, and the communications

facilitation charge. We find Ruth answering the court's questions during the plea hearing with precision, reflecting his intelligence and awareness. Ruth was caught between the proverbial rock and a hard place; the plea agreement was his best way out. He cannot now renounce that agreement by "throwing off" on his counsel.

2. Factual Basis for Guilty Plea.

Ruth's challenge to his conviction on the grounds that an inadequate factual basis had been established has even less merit. The trial court and both parties rely on our en banc decision in United States v. Dayton, 604 F.2d 931 (5th Cir. 1979), cert. denied, 445 U.S. 904 (1980), as providing the standard to be applied. Dayton is governing precedent for the

direct appeal of a guilty plea conviction. The present case presents a collateral attack. In a collateral attack, the applicable test is that announced in United States v. Timmreck, 441 U.S. 780, 783 (1979) (quoting Hill v. United States, 368 U.S. 424, 428 (1962): the claimed defect must be jurisdictional or constitutional and be "a fundamental defect which inherently results in a complete miscarriage of justice." In addition, the claimed defect must present "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." See United States v. Capua, 656 F.2d 1033, 1037 (5th Cir. 1981) ("In determining whether a claim of error is cognizable under Section 2255, a distinction is drawn between constitutional or jurisdictional errors

on the one hand, and mere errors of law on the other.")

Establishment of a factual basis for a guilty plea is not constitutionally required. See Kercheval v. United States, 274 U.S. 220 (1927). Until the 1966 amendments, Rule 11 of the Federal Rules of Criminal Procedure did not require establishemnt of a factual basis. In the United States v. Davila, 698 F.2d 715, 717 (5th Cir. 1983), we capsulated the developing rules:

> The inquiry as to [the] factual basis must be "precise enough and sufficiently specific" to determine that the defendant's conduct was "within the ambit of that defined as criminal." . . . This factual basis must appear on the record. . . . An acceptance by the court of the defendant's guilty plea is deemed to be a factual finding on each of these requirements and is reviewable [on direct appeal] under the clearly erroneous standards . . . .

(Citations omitted.) The reason for the development of a factual basis for the plea on the record is to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." McCarthy v. United States, 394 U.S. 459, 467 (1969).

At the plea hearing, Ruth testified he understood the nature of the charges. The court then stated the essential elements of each of the two charges; Ruth responded that he understood. Ruth then pled guilty and was instructed by the court to listen carefully while the U.S. Attorney stated what the government expected to prove in the trial of his case. The prosecutor recited details of

the conspiracy in which Ruth and others planned to smuggle marihuana. The period covered was May 1975 to December 1978. The factual recitation included a statement that Ruth was pilot on many of the smuggling flights. As to the telephone use count, the prosecutor stated that Ruth used a telephone to communicate with one John Allen during the importation of marihuana from Mexico and Columbia into Texas. When asked if he concurred in the recital, Ruth declared: "Yes, I did conspire to import with Mr. Allen." The following colloquy then ensued:

THE COURT: All right, did you conspire some time between May, '75 and December of 1978?

MR. RUTH: Yes, Your Honor, I did.

THE COURT: And did you conspire to import marijuana?

MR. RUTH: Yes Your Honor, I did.

THE COURT: Did you know that the possession of marijuana, the importation of marijuana as a controlled substance was against our laws?

MR. RUTH: Yes, Your Honor, I did.

THE COURT: All right. And did you, about July 1, 1978, use a telephone to communicate with a Mr. John Brett Allen concerning the importation of the marijuana?

MR. RUTH: Yes, Your Honor.

The factual basis for Ruth's plea to the information was adequately established. It enabled the trial court to determine that Ruth's conduct constituted violations of the relevant statutes, and ensured that Ruth did not plead guilty without being aware that in fact he was innocent. We perceive neither jurisdic-

tional nor constitutional defect nor even a semblance of less than fair proceedings.

AFFIRMED.

OPINION OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

STEPHEN LOUIS RUTH	)	
	)	
vs.	)	NO.
	)	A-82-CA-428
	)	(A-80-Cr-35)
	)	
UNITED STATES OF AMERICA	)	

MEMORANDUM OPINION AND ORDER

This is Petitioner's second Motion under 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. After reviewing the grounds presented, and the argument and authorities of counsel, the Court is of the opinion that said Motion is without merit, for the reasons enumerated below.

Petitioner STEPHEN LOUIS RUTH was indicted, along with twelve other defendants, in a 35-count indictment alleging

a conspiracy to illegally import marijuana from Mexico. RUTH entered into a plea agreement with the Government whereby he would plead guilty to one count of a violation of 21 U.S.C. §963 (conspiracy to import marijuana) and one count of using a telephone to facilitate the commission of a felony in violation of 21 U.S.C. §843(b). A superseding information was filed to this effect, and on May 26, 1981, RUTH was sentenced to serve five years on Count I, under the provisions of 18 U.S.C. §4205(b)(2). The sentence on Count II was four years suspended to five years probation (supervised) under 18 U.S.C. §3651, which was to run consecutive to the sentence imposed on Count I.

Petitioner did not appeal, but did file a §2255 motion with this Court which

raised four grounds: (1) an involuntary guilty plea because he was promised only a six month to one year sentence; (2) his guilty plea was coerced by being indicted on a large number of weak charges, making it difficult to present a defense; (3) an involuntary plea because he was under medication; and (4) violation of Petit v. United States, 361 U.S. 529 (1960).

The Court held an evidentiary hearing on February 25, 1983, at which RUTH appeared pro se, and Assistant United States Attorneys Archie Carl Pierce and James Bock appeared for the Government. RUTH's former counsel, Mr. Michael Kennedy, appeared as a witness on RUTH's behalf. Following this evidentiary hearing, Petitioner's first §2255 motion was denied, on March 21, 1983.

Petitioner is now represented by counsel, Mr. Griffin B. Bell, Jr., of Atlanta, Georgia, and has filed this second §2255 motion in which two grounds are raised: (1) ineffective assistance of counsel; and (2) involuntary plea due to violation of Rule 11(f) of the Federal Rules of Criminal Procedure.

RUTH's claim of ineffective assistance of counsel is based on advice given him by Mr. Kennedy as to how long he could expect to serve if he accepted the Government's plea agreement. Mr. Kennedy represented that, in his experience, RUTH could expect to be released after serving approximately one year of a five year sentence, if the Parole Board followed its usual procedures. [In this regard, counsel advised that the counts of the original indictment which were to be

dismissed would not be considered by the Parole Board in determining RUTH's eligibility for parole.]

This advice turned out to be incorrect, for not only did the Parole Board take into account the acts alleged in the dismissed indictment (which it may do under 18 U.S.C. §4207 (Supp. 1982)), but Mr. RUTH is still incarcerated as of February, 1984, and his counsel has advised the Court that his scheduled release date is not for another nine or ten months.

Despite the Court's sympathy for Mr. RUTH's plight, and despite the fact that the Parole Commission may have exceeded its bounds in the manner suggested by Allen v. Hadden, 536 F.Supp. 586, 595 (D. Colo. 1982), Petitioner's case is in the

posture of a claim of ineffective assistance of counsel, and it is from that standpoint that this Court must proceed.

Mr. Kennedy, in presenting the Government's offer to RUTH before the guilty plea was entered, stated his belief that RUTH would serve only one year before being released on parole. Between entry of the guilty plea and the time of sentencing, the United States Probation Office prepared the required pre-sentence investigation report. Both Mr. Kennedy and Mr. RUTH were given the opportunity to review this document before sentencing, and in it was clearly stated that RUTH's parole guidelines were 36-48 months.

Petitioner relies heavily on Strader v. Garrison, 611 F.2d 61 (4th Cir. 1979),

in support of his contention that misadvice regarding parole eligibility rises to the level of ineffective assistance of counsel. Not only is Strader a Fourth Circuit case by which this Court is not bound, but the Court finds the instant case factually distinguishable. In Strader Petitioner's counsel had failed to read published regulations of the North Carolina Department of Correction which clearly fixed the time to be served, after recomputation in light of a plea to offenses committed while an escapee. Counsel "grossly misinformed" (Id. at 65) his client as to established, unvarying rules, thereby inducing Strader to plead guilty on the basis of a promised but erroneous release date.

Here, a prediction more than a guarantee is involved. Mr. Kennedy did

not -- and indeed could not -- promise RUTH a definite parole date; he merely told RUTH what his many years of practice had led him to expect, that RUTH would serve only one year. Where a sentence is imposed under §4205(b)(2), parole is unquestionably discretionary with the Parole Commission. "There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 7, 99 S.Ct. 2100, 2104, 60 L.Ed.2d 668 (1979). See also, Brown v. Lundgren, 528 F.2d 1050 (5th Cir.), cert. denied, 429 U.S. 917 97 S.Ct. 308, 50 L.ED.2d 283 (1976).

This Circuit's standard for reasonably effective assistance of counsel in

the context of a guilty plea has been articulated as follows:

> It is the lawyer's duty to ascertain if the plea is entered voluntarily and knowingly. He must actually and substantially assist his client in deciding whether to plead guilty. It is his job to provide the accused an "understanding of the law in relation to the facts." The advice he gives need not be perfect, but it must be reasonably competent. His advice should permit the accused to make an informed and conscious choice. In other words, if the quality of counsel's service falls below a certain minimum level, the client's guilty plea cannot be knowing and voluntary because it will not represent an informed choice. And a lawyer who is not familiar with the facts and law relevant to his client's case cannot meet that required minimal level.

Herring v. Estelle, 491 F.2d 125, 128 (5th Cir. 1974) (citations omitted). It would be different if Mr. Kennedy had affirmatively guaranteed Petitioner that he would be free in a year, for that

would come closer to a misrepresentation of the law as contemplated in Herring, supra. The fact remains that both Petitioner and counsel had access to the presentence investigation report which quoted guidelines of 36-48 months. It cannot be deemed ineffective assistance of counsel that Petitioner either overlooked that portion, or chose not to inquire of his counsel about its meaning. (The Court has had several opportunities to observe Mr. RUTH, and notes that he is a very articulate, intelligent person.)

Even if Petitioner had presented a claim cognizable under Strader v. Garrison, supra, he must also show that counsel's mistaken advice induced his guilty plea. RUTH was faced with a possible exposure of approximately forty years if convicted under the original

indictment; after agreeing to plead guilty to the superseding information, the maximum sentence was nine years, and he was in fact only sentenced to five years. Petitioner's potential period of incarceration was greatly reduced by the plea bargain, regardless of the possible parole date. In short, the Court concludes that Mr. Kennedy's advice as a whole, apart from any mistaken predictions of parole eligibility, demonstrates effective assistance of counsel.

Petitioner next alleges that the Court failed to establish a factual basis in accepting the guilty plea, as required by Rule 11(f), Fed.R.Crim.P., particularly in view of the fact that Count I (the conspiracy count) of the superseding information did not reiterate the overt

acts described in the conspiracy count of the indictment, and the Court did not ask Petitioner for a recitation of his understanding of the details.

The standard for a decision concerning the factual basis for a guilty plea is set forth in United States v. Dayton, 604 F.2d 931 (5th Cir. 1979). The Court must be subjectively satisfied that there is a factual basis for the plea, and must produce a record of the proceedings to allow for proper review. Id. at 938.

The transcript of the guilty plea, taken on March 16, 1981, includes the following colloquy:

> THE COURT: In going over the -- well, what do you understand the charges to be?
>
> MR. RUTH: I understand the charge is that on or about July, 1978, that I had a telephone conversation with John Allen, and that we conspired to import marijuana.

THE COURT: All right. There was two charges, I believe. One is conspiracy to import marijuana, and the other one is, as you say it, using the telephone to facilitate the commission of that particular felony. You understand those two charges?

MR. RUTH: Yes, Your Honor.

(Tr. p. 10)

THE COURT: All right. What could the Government be expected to prove in this case if called on to do so, Mr. Bock? Listen to this very carefully, Mr. Ruth.

MR. BOCK: If this case were tried, Your Honor, the Government would show that beginning on or before May of 1975, and continuing up until December of 1978, in the Western District of Texas, the State of Colorado, Florida, the Republic of Mexico and the Republic of Columbia, the Defendant and other parties, to-wit a Mr. Allen, who had originally started the conspiracy back in May of 1975, the conspiracy started with the obtaining of a landing field somewhere near Lomax, Texas, with the arrangements for the importation of marijuana both from the Republic of Columbia and Mexico.

The flights were flown into the Lomax area in Texas, that this Defendant and others joined in the conspiracy at various times during the period 1975 through 1978; that this Defendant with Mr. Allen and others actually flew loads of marijuana into the areas in the Western District of Texas, being, one, the Lomax area, I believe, and also another ranch that was later leased by the conspirators where an air field was constructed, and various flights of marijuana from the Republic of Mexico, some of which I believe originated in the Republic of Columbia, but landed in Mexico and came on into the area in the Western District of Texas. Several flights were made during this period of time, many of which were flown by the Defendant himself. That with regard to Count 2 of the indictment, the Government would show that on or about July the 1st of 1978, in the Western District of Texas, Mr. Ruth knowingly and willfully engaged in the use of a telephone to communicate with the Codefendant, Mr. Allen, concerning the importation of marijuana as alleged in Count I, both from the Republic of Mexico and I believe the Republic of Columbia, into the Western District of Texas.

THE COURT: Do you agree with that, Mr. Ruth?

MR. RUTH: Yes, I did conspire to import with Mr. Allen.

(Tr. pp. 18-19)

In reviewing RUTH's plea of guilty, the Court is more than satisfied that the requirements of Rule 11(f) and Dayton, supra, were met as to a factual basis, and that Petitioner's plea was entered both voluntarily and knowingly.

For the above reasons, the Court finds that both of Petitioner's grounds are without merit, and enters the following Order:

IT IS ORDERED that the Motion under 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, filed by STEPHEN LOUIS RUTH, be and is hereby DENIED.

SIGNED and ENTERED this 3rd day of February, 1984.

UNITED STATES
DISTRICT JUDGE